CHEW THAI KAY & ANOR v. TENAGA NASIONAL BHD

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[CIVIL SUIT NO: AA-22NCVC-81-06-2018]
16 MAY 2019

CIVIL PROCEDURE: *Injunction – Application for – Application to prohibit electricity supplier from disconnecting electricity supply – Discovery of tampering of electricity meter at customer/applicant's premise – Electricity supplier sent notice of disconnection of electricity supply to applicant – Whether applicant has locus standi to file application for injunction – Whether applicant has cause of action against electricity supplier – Whether applicant would suffer losses if injunction not allowed – Whether application for injunction ought to be allowed*

UTILITIES: *Electricity – Electricity supply – Disconnection – Discovery of tampering of electricity meter at customer's premises – Electricity supplier sent notice of disconnection of electricity supply to customer – Whether electricity supplier ought to be prohibited from disconnecting electricity supply to customer's premise – Electricity Supply Act 1990, ss. 37 & 38(1)*

The second plaintiff had purchased a premise, from the first plaintiff, to carry out its business of seafood processing, freezing and coldstoraging. During an inspection, the defendant's employees discovered tampering of electricity meter at the said premise. The defendants then proceeded to issue a notice of disconnection of electricity supply ('notice') to the plaintiffs, stating that electricity supply to the premise would be disconnected. According to the second plaintiff, (i) the electricity supply to the premise was registered under the name of the original owner, the first plaintiff; and (ii) despite numerous attempts to effect change, the applications had not been approved by the defendant. The plaintiffs filed a writ against the defendant, seeking, *inter alia*: (i) a declaration that the plaintiffs did not tamper the meter; (ii) an injunction to prohibit the defendant from disconnecting the electricity supply to the premise; and (iii) a declaration that the notice was null and void. In the present application ('encl. 4'), the plaintiffs sought for an injunction to prohibit the defendant from disconnecting electricity supply to the premise, on the grounds that: (i) the second plaintiff had the *locus standi* to file encl. 4 as, although the first plaintiff was registered as the user, the actual user of electricity supply at the premise was the second plaintiff; (ii) the defendant could not disconnect the electricity supply as corrective measures had been taken on the alleged tampered meter; (iii) any disconnection carried out would cause irreparable damage to the second plaintiff's business; and (iv) the defendant would not suffer any losses in the event the disconnection is not carried out. The defendant raised preliminary objection against encl. 4 and argued that the second plaintiff had no *locus standi* to file the application and had no cause of action against the defendant.

Held (allowing encl. 4):

(1) The defendant's preliminary objection was dismissed. Even though it was not registered with the defendant, the second plaintiff had exhibited a sale and purchase agreement that showed it had legally purchased the premise. The second plaintiff had (i) shown sufficient proof that it had legitimate interest and business at the premise; (ii) fulfilled 'the threshold of adversely affected' by the intended disconnection of electricity supply at the premise; and (iii) clearly established its *locus standi* to bring this application. Furthermore, the fact that the second plaintiff was carrying out the business activities, as averred, was not challenged by the defendant. (paras 15 & 16)

(2) In determining whether the plaintiffs had established *bona fide* serious issues to be tried, the court was bound by the tests laid down in *Keet Gerald Francis Noel John v. Mohd Noor Abdullah* which stipulated that the court (i) must bear in mind that the pleadings and evidence were incomplete at this stage; (ii) must refrain from making any determination on the merits of the claim or any defence to it; (iii) needed to identify the issues and decide whether they were serious enough to merit a trial; and (iv) if, at that juncture, the answer was in the negative, then the relief for injunction would be refused. If the answer was in the affirmative, the court would then move on to the next step to determine where justice laid. In the present application, the main issue, being the alleged meter-tampering, was a serious issue that merited a trial. A full trial must be conducted to hear witnesses' evidence to enable the court to arrive at a final decision. Clearly, there were issues to be tried. (paras 33-35)

(3) The plaintiffs, in particular the second plaintiff, would suffer greater injustice if the relief sought was withheld. Taking into consideration the nature of the second plaintiff's business, the balance of convenience and justice lay for the plaintiffs. The disconnection at the second plaintiff's premise could not be allowed to be carried out at this stage. (paras 36 & 37)

Case(s) referred to:

Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***
Dai-Ichi Electronics (M) Sdn Bhd v. Tenaga Nasional Bhd [1996] 1 LNS 47 HC ***(refd)***
Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd [2018] 9 CLJ 184 CA ***(dist)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd [2015] 6 CLJ 788 HC ***(refd)***
Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 HC ***(refd)***
Ooi Poh Chin v. Tenaga Nasional Bhd [2016] 1 LNS 1024 HC ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
Tan Yeong Kim lwn. Tenaga Nasional Bhd [2000] 8 CLJ 629 HC ***(refd)***
Tenaga Nasional Berhad v. Chan Lee Fun & Anor (Mahkamah Rayuan Sivil A-04(IM)(NCVC)-348-08-2017) (Unreported) ***(refd)***

Tenaga Nasional Berhad v. Mun Chee Chuen & Anor (Mahkamah Rayuan Sivil N-02(IM)(NCVC)-581-03-2017) (Unreported) ***(refd)***
Tenaga Nasional Bhd v. Restoran Al Ibrahim Maju [2018] 1 LNS 925 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd & Another Appeal [2011] 4 CLJ 838 CA ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd [2016] 1 CLJ 318 HC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 37, 38(1)
Rules of the High Court 1980, O. 53 r. 3

For the plaintiffs - Lai Chee Meng; M/s CM Lai & Partners
For the defendant - Prithi Verma; M/s Prithi, Junainah & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Radzi Harun JC:

[1] Enclosure 4 is an application by the plaintiffs for this court to issue an injunction to prohibit the defendant from disconnecting electricity supplies to the second plaintiff's premise at No. 1541, Lorong Kerapu, Taman Sejahtera, 35400 Hutan Melintang, Perak ("said premise").

[2] I had allowed the plaintiffs' application and the defendant is aggrieved by that decision and filed this appeal.

[3] Below are my grounds for that finding.

Facts

[4] The second plaintiff is a company carrying out the business of seafood processing, freezing and coldstoraging at the said premise.

[5] The said premise originally belonged to the first plaintiff. By way of a sale and purchase agreement dated 31 March 2009, it was bought by the second plaintiff.

[6] During an inspection at the said premise on 7 June 2018, the defendant's employees had discovered tampering of the electricity meters.

[7] Upon such findings, the defendant issued the notice of disconnection of electricity supply ("NDES") under sub-s. 38(1) of the Electricity Supply Act 1990 ("ESA") on the same date, informing the plaintiffs that the electricity supplies to the said premise would be disconnected on 3 July 2018.

[8] The electricity supplies to the said premise had been registered in the name of the original owner, first plaintiff, ever since the said premise was purchased by the second plaintiff in 2009 until the inspection date.

[9] The second plaintiff pleaded that despite numerous attempts to effect the change in the registered user name for the said premise, the applications had not been approved by the defendant, a claim which the defendant denied.

[10] On 27 June 2018 the plaintiffs filed a writ against the defendant claiming for, *inter alia*:

(i) a declaration that the plaintiffs did not tamper the meters;

(ii) an injunction to prohibit the defendant from disconnecting the electricity supplies to the said premise; and

(iii) the NDES dated 7 June 2018 to be declared null and void.

[11] On 28 June 2018 the plaintiffs filed this application in encl. 4, premised mainly on the following four grounds:

(i) The second plaintiff has the *locus standi* to file this application as although the first plaintiff is the registered user of electricity supplies at the said premise, the actual user is the second plaintiff;

(ii) As corrective measures had been taken on the alleged tampered meter, the defendant cannot continue with its action to disconnect electricity supplies to the said premise;

(iii) Any disconnection to be carried out at this juncture would cause irreparable damage to the second plaintiff's business;

(iv) The defendant would not suffer any loss in the event that the disconnection is not carried out at this juncture until the final disposal of the plaintiff's suit.

[12] Apart from replying to the issues raised by the plaintiffs as enumerated above, the defendant argued that the second plaintiff has no *locus standi* to make this application and the second plaintiff has no cause of action against the defendant.

Finding

Locus Standi

[13] That there exist no privity of contract between the second plaintiff and the defendant, and the NDES was issued to the first plaintiff as the registered user were not disputed facts.

[14] The learned counsel for the defendant had cited *Ooi Poh Chin v. Tenaga Nasional Bhd* [2016] 1 LNS 1024; [2016] 6 AMR 255 and *Tenaga Nasional Berhad v. Restoran Al Ibrahim Maju* [2018] 1 LNS 925 to fortify the defendant's position that the application should be dismissed *ad limine* as the second plaintiff has no *locus standi* and is also not a registered user with Tenaga Nasional Berhad.

[15] I decided to distinguish the facts of the case before me with those found in the cited authorities. Here the second plaintiff did not deny that it is not registered with the defendant. But it had exhibited in the affidavit the existence of a sale and purchase agreement that showed it had legally purchased the premise from another party, who was the person that bought the said premise from the first plaintiff through an auction. The fact that the second plaintiff is carrying out the business activities as averred in its affidavit was not challenged by the defendant.

[16] I am satisfied that the second plaintiff had showed sufficient proof, for the purposes of this application, that it has legitimate interest and business at the said premise. I am further satisfied, applying the principle laid down by the Court of Appeal in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, that the second plaintiff had fulfilled "the threshold of adversely affected" by the intended disconnection of electricity supplies at the premise. The second plaintiff clearly established its *locus standi* to bring this application. I dismiss the defendant's preliminary objection on this point.

Arguments By Both Parties For And Against Injunction

[17] Relying mainly on *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193, the plaintiffs argued that they had fulfilled the three requirements laid down by the Court of Appeal in that case, *viz*:

(i) that the totality of the facts presented before this court discloses a *bona fide* serious issues to be tried;

(ii) after weighing all matters, this court could conclude that the plaintiffs, in particular the second plaintiff, would suffer greater injustice if relief is withheld;

(iii) that it is just and proper for this court to answer affirmatively the plaintiffs' prayer for the issuance of the injunction, as maintaining the *status quo* will produce a just result for the period between the date of the application and the trial proper.

[18] The plaintiffs further submitted that this court must follow two recent unreported decisions of the Court of Appeal in *Tenaga Nasional Berhad v. Mun Chee Chuen & Anor* (Mahkamah Rayuan Sivil N-02(IM)(NCVC)-581-03-2017) and *Tenaga Nasional Berhad v. Chan Lee Fun & Anor* (Mahkamah Rayuan Sivil A-04(IM)(NCVC)-348-08-2017) where the court held in both cases that injunction should be allowed to prohibit Tenaga Nasional from disconnecting electricity supplies pending the disposal of main suits, when Tenaga Nasional did not show any prejudicial effect it suffers if the *status quo* is maintained.

[19] The defendant's opposition on the injunction premised on the main arguments that Tenaga Nasional could disconnect although rectification actions had been done on the alleged tampered meters, and that Tenaga Nasional does not have to show who tampered the meters.

[20] This brings me to consider the issue of Tenaga Nasional Berhad exercising its statutory power of disconnecting the electricity supply under s. 38(1) of ESA, which I regard as the crux of this judgment.

Tenaga Nasional's Statutory Powers To Disconnect

[21] Both parties had argued before me the authorities that laid down the so-called two school of thoughts on the question of when could Tenaga Nasional Berhad disconnect the electricity supplies to a premise upon its employees' finding of incidences of meter tampering.

[22] The Court of Appeal in *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892; [2007] 1 MLJ 217 held that as soon as *Tenaga Nasional Berhad* found evidence of tampering, it could effect the disconnection "to halt an on going offence instantly or speedily". The brief facts in *Claybricks* is worth reiterating. On 20 May 2005, the High Court granted an interim injunction against Tenaga Nasional's notice to disconnect electricity to the appellant's premise. When the injunction was heard *inter partes* before the learned High Court Judge on 17 August 2005, the *ex parte* injunction was set aside. The learned High Court Judge ruled that there was no serious issues for trial as s. 38(1) of ESA provided the respondent with full authority to disconnect the electricity supplies. Should the appellant be aggrieved by the action, other form of remedies are still available to the appellant if it is later found that the said disconnection is premised on *mala fide*. The appellant then applied at the Court of Appeal for an *Erinford* injunction pending the disposal of the appeal against the said High Court decision. The Court of Appeal decided not to endorse the decision of Vincent Ng J (as he then was) in *Dai-Ichi Electronics (M) Sdn Bhd lwn. Tenaga Nasional Berhad* [1996] 1 LNS 47; [1996] 4 MLJ 506. Instead, Their Lordships affirmed the decision of Alauddin Mohd Sheriff J (as His Lordship then was) in *Tan Yeong Kim lwn. Tenaga Nasional Berhad* [2000] 8 CLJ 629 whom has held that there is no requirement under s. 38(1) of the ESA to prove any criminal wrongdoing before s. 38(1) could be triggered as that section was drafted in such a way to grant effective authority to TNB to stop any form of wrongdoing and not to allow it to continue. The court further held that:

> … s. 38(1) was specifically provided to safeguard the interest of the respondent and to enable it to act expediently to prevent abuse such as stealing the electricity supplied by the respondent.

[23] *Claybricks* (*supra*) was affirmed further in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2011] 4 CLJ 838, when the Court of Appeal held that s. 38 of ESA provided specifically for the preservation of Tenaga Nasional Berhad's interests and empowered it to act expeditiously to prevent misuse, such as the theft of electricity supplied by it. No offence needed to be proved in court before the power under the section could be invoked. This was in order to ensure swift action could be taken to immediately avoid the further illegal usage by the perpetrator. This decision was further upheld by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, where the Federal Court held:

> Even though the effect of the letter is quite harsh, S. 38 of the Act [the ESA] empowers the respondent to discontinue the supply of electricity based on the subjective finding of its employee if any offence has been found committed under s. 37(1), 37(3) or 37(14).

[24] However, it must be emphasised that the main issue before the Federal Court was on the question of leave for a judicial review. Leave was applied for at the High Court by the appellant pursuant to O. 53 r. 3 of the Rules of the High Court 1980 (the Rules), for a judicial review of a decision made by Tenaga Nasional Berhad (the respondent), a decision which aggrieved the appellant. The High Court dismissed the leave application. The appellant then filed the relevant appeal to the Court of Appeal but was dismissed too. At the Federal Court, the bench affirmed the High Court's decision and dismissed the appeal as "even though satisfied that the appellant has successfully established the issue of *locus standi* and factor of time, it failed to establish that the impugned matter falls under public law realm."

[25] Nantha Balan JC (as His Lordship then was) in *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 3 CLJ 825, expounded further the principles laid down in *Claybricks* (*supra*) and *WRP Asia* (*supra*) when His Lordship held:

> ... if the offence is continuing, then quite clearly the power under s. 38(1) of the Act can be invoked at any time, regardless of whether it is urgent or not and regardless of whether TNB has proven in criminal proceedings that an offence has been committed. But the situation that presents itself in this case is different. In the present case, the offence under s. 37(1) of the Act is a past offence and not one which is continuing. Here, TNB has admitted that the meter was replaced on 6 June 2014. Also, there is no suggestion of any tampering of the meter since that date. As such, I must proceed on the basis that there has been no tampering after 6 June 2014 and the position since that date is that the amount of electricity consumed at the said premises is being correctly recorded. Hence, this brings me back to the question as to whether TNB may subsequently invoke the power to disconnect under s. 38(1) of the Act in circumstances where there is no longer any tampering or theft of electricity.

> In this regard it is clear from the judgment of the Court of Appeal in *Claybricks* (*supra*) and the judgment of the Federal Court in *WRP Asia Pacific* that the power under s. 38(1) of the Act is necessary to ensure that TNB is able to immediately severe electricity supply to avoid further illegal usage by the perpetrator. Quite clearly on the facts of the present case, there is no longer any illegal usage by the consumer such as to warrant the invoking of the power to disconnect under s. 38(1) of the Act. In this regard, it should be emphasised and borne in mind that the power to disconnect the supply of electricity is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity. (See the proviso to s. 38(1) of the Act which allows disconnection for a maximum of three months).

[26] The principle that was laid down in *Modernria* (*supra*) was reemphasised and reaffirmed in *Mayaria Sdn Bhd & Anor v. Tenaga Nasional Berhad* [2015] 6 CLJ 788 and *Xin Guan Premier Sdn Bhd v. Tenaga Nasional Berhad* [2016] 1 CLJ 318 where it was held that Tenaga Nasional Berhad could only lawfully disconnect the electricity supply to a consumer's premise "when the offence is still continuing and conversely cannot if it has since ceased".

[27] The second school of thought read the decision in *Claybricks* (*supra*) in a slightly different manner. The Court of Appeal in *Karun Klasik Sdn Bhd v. Tenaga Nasional Berhad* [2018] 9 CLJ 184, disagreed with *Modernria* (*supra*) and *Mayaria* (*supra)* when it held that "the removal of the impugned meter or rectification of the same does not in itself remedy the offence of unlawful abstraction." The court went on to decide that for as long as the monies due to Tenaga Nasional remained unpaid, "the electricity effectively remains consumed but unpaid for and therefore remains an unlawful act or offence under s. 37."

[28] This court wishes to compare the facts leading to the application before me now with the facts that led to the decisions in *Modernria, Mayaria*, *Xin Guan* and *Karun Klasik*.

[29] *Mayaria*, *Modernria* and *Xin Guan* all dealt with the application for an interlocutory application to restrain Tenaga Nasional Berhad from disconnecting the electricity supply to the said premises pending disposal of the main action. The main contention supporting the application was that there was no lawful basis for Tenaga Nasional to invoke its powers under s. 38(1) of the Act since the rectification works performed upon the discovery of the meter tampering must have meant that the unauthorised interference had been discontinued and thus any further presumed loss of electricity ceased to be an issue. The courts in all three cases had allowed for the injunction against Tenaga Nasional until the final disposal of the main action.

[30] *Karun Klasik* (*supra)*, on the hand, dealt with the plaintiff's (Tenaga Nasional) claim for back charges for the use of electricity by the defendant, and the defendant's claims for loss and damages it had suffered due to the

plaintiff's trespass, damage to its reputation and wrongful acts of the plaintiff. After a full trial, the High Court dismissed both the plaintiff's claim and the defendant's counter-claim, which was affirmed by the Court of Appeal.

[31] This court decided to distinguish *Karun Klasik* (*supra*) with the case before me now as the issues discussed, and the stage and nature of proceeding in *Karun Klasik* are totally dissimilar with that in this case.

[32] On the other hand, I found that issues discussed, nature of application and stage of proceeding in *Mayaria* (*supra*), *Modernria* (*supra*) and *Xin Guan Premier* (*supra*) are somewhat akin to the current case before this court. I therefore decided to apply and follow the findings therein.

Did The Plaintiffs' Application Fulfilled Keet Gerald's Tests?

[33] In determining whether the plaintiffs have established *bona fide* serious issues to be tried, I am bound by the tests as laid down by the Court of Appeal in *Keet Gerald* (*supra*), as follows:

(i) I must bear in mind that the pleadings and evidence are incomplete at this stage;

(ii) I must refrain from making any determination on the merits of the claim or any defence to it;

(iii) I only need to identify the issues and decide whether these are serious enough to merit a trial;

(iv) If at that juncture I find the answer to be in the negative, then the relief for injunction is refused. On the other hand if the answer is in the affirmative, I would then move on to the next step to determine where does the justice lies.

[34] Thus, whilst it is clear to me upon perusing the affidavits that the pleadings and evidence are incomplete at this stage, and I am not making any determination on the merits of the claim or any defence to it, I had identified and decided that the main issue being the alleged tampering of the meters at the plaintiffs' premises is a serious issue that merits a trial.

[35] I found that the arguments put forth by the defendant concerning:

(i) the facts leading to the issuance of the notice of disconnection;

(ii) proof of tampering is not a prerequisite for a disconnection; and

(iii) legal position of s. 38(1) of ESA,

relate to the merit of the plaintiffs' case. By canvassing those issues in detail at this stage, it provided me with a precursor of what are the issues that I must decide upon. And it is trite that I cannot decide on those issues raised by the defendant at this stage either. The affidavit evidence available at this stage are insufficient. I must conduct a full trial to hear witnesses' evidence to enable me to come to a final decision. Clearly there are *bona fide* issues to be tried.

A

Conclusion

[36] After weighing all matters as stated in the preceding paragraphs, this court concluded that the plaintiffs, in particular the second plaintiff, would suffer greater injustice if the relief sought is withheld and that it is just and proper for this court to answer affirmatively the plaintiffs' prayer for the issuance of the injunction, as maintaining the *status quo* will produce a just result for the period between the date of the application and the trial proper.

B

[37] Consequent to the findings above, and taking into consideration also the nature of the second plaintiff's business, it is my finding that the balance of convenience and justice of the case lies for the plaintiffs. The disconnection at the second plaintiff's premise cannot be allowed to be carried out at this stage.

C

[38] The plaintiffs' application in encl. 4 is allowed with costs ordered to be in the cause.

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